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Volume 10 | Number 2

Article 2

3-1-1988

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Recommended Citation

Charles W. Babcock, *Could We Alone Have This? Comparative Legal Analysis of Product Liability Law and the Case for Modest Reform*, 10 Loy. L.A. Int'l & Comp. L. Rev. 321 (1988).

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Could We Alone Have This? Comparative Legal Analysis of Product Liability Law and the Case for Modest Reform

CHARLES W. BABCOCK*

I. INTRODUCTION

Since the Ford Administration,¹ and thus for more than a decade, many groups and individuals have urged reform of United States product liability law and practice.² That body of law developed over the years without significant societal objection until the introduction of the concept of "strict liability,"³ first in a 1963 California case,⁴ then by the American Law Institute the following year,⁵ and finally in

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1. It was in April 1976 that the Inter-agency Task Force on Product Liability was appointed. See generally Schwartz, *The Federal Government and the Product Liability Problem: From Task-Force Investigation to Decisions by the Administration*, 47 U. CIN. L. REV. 573 (1978-79).

2. For example, recent federal product liability reform vehicles have included S. 2631, 97th Cong., 2d Sess. (1982); S. 44, 98th Cong., 1st Sess. (1983); S. 100, 99th Cong., 1st Sess. (1985); S. 1999, 99th Cong., 1st Sess. (1985); S. 2760, 99th Cong., 2d Sess. (1986); H.R. 1115, 100th Cong., 1st Sess. (1987). There has been much activity in the states as well.

3. Prosser defines strict liability as "liability that is imposed on an actor apart from either (1) an intent to interfere with a legally protected interest without a legal justification for doing so, or (2) a breach of duty to exercise reasonable care." R. KEETON, PROSSER AND KEETON ON TORTS, 534 (West 5th ed. 1984).

4. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

5. RESTATEMENT (SECOND) OF TORTS § 402A (1964). At the time the Institute added the strict liability rule to its "restatement" of existing law, only one jurisdiction, California, actually had adopted the rule. The Reporter for the Second Restatement was Professor Prosser and the Chief Advisor was Chief Justice Traynor, author of the adopting opinion. See *Greenman*, 59 Cal. 2d 57. "When social thinkers cannot find precedent for new theories of law, they look for almost-precedent and try most creatively to stretch it into something that looks like it was always there, waiting to be recognized." In fact, this statement was made nearly 20 years later in *opposition* to one of the federal product liability reform bills. *Product Liability Act: Hearings on S. 44 Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science, and Transportation*, 98th Cong., 1st Sess. 194 (1983) (statement of H. Specter, President, Assn. of Trial Lawyers of Am., in response to questions of Senator Hollings) [hereinafter *Hearings on S. 44*].

an avalanche of state decisions before⁶ and after the beginning of the next decade.⁷ The reform movement⁸ is prompted by a profound concern that the concept of "strict liability,"⁹ together with various rules that developed in conjunction with it, may not be of long-term net value to the United States in light of increasing international economic competition.

As the debates over product liability reform continue, it may be helpful to consider how product-related accident claims are treated in the legal systems of other technologically advanced nations. Little such analysis seems to have been performed. Perhaps the clearest comparative analysis can be made if one employs a single hypothetical factual situation to examine *seriatim*, the way a civil action based upon those facts would be treated in each nation under study. That is the technique employed in this article.

One could agree readily that two automobiles traveling along

6. *E.g.*, Clary v. Fifth Ave. Chrysler Center, Inc., 454 P.2d 244 (Alaska 1969); O. S. Stapley Co. v. Miller, 103 Ariz. 556, 447 P.2d 248 (1968); Garthwait v. Burgio, 153 Conn. 284, 216 A.2d 189 (1965); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Dealers Transp. Co. v. Battery Distrib. Co., 402 S.W.2d 441 (Ky. 1965); McCormack v. Hanksraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966), *cert. denied sub nom.* Yates v. Hodges, 386 U.S. 912 (1967); Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969); Shoshone Coca-Cola Bottling Co. v. Dolinski, 82 Nev. 439, 420 P.2d 855 (1966); Buttrick v. Arthur Lessard & Sons, Inc., 110 N.H. 36, 260 A.2d 111 (1969); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); Lonrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966); Heaton v. Ford Motor Co., 248 Or. 467, 435 P.2d 806 (1967); Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966); Ford Motor Co. v. Lonon, 217 Tenn. 400, 398 S.W.2d 240 (1966); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967); Ulmer v. Ford Motor Co., 75 Wash. 2d 522, 452 P.2d 729 (1969); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

7. *E.g.*, West v. Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976); Stewart v. Budget Rent-A-Car, 52 Haw. 71, 470 P.2d 240 (1970); Shields v. Morton Chem. Co., 95 Idaho 674, 518 P.2d 857 (1974); Cornette v. Searjeant Metal Prods. Inc., 147 Ind. App. 46, 258 N.E.2d 652 (1970); Hawkeye Sec. Ins. Co. v. Ford Motor Co., 174 N.W.2d 672 (Iowa 1970); Brooks v. Dietz, 218 Kan. 698, 545 P.2d 1104 (1976); Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976); Brandenburger v. Toyota Motor Sales, Inc., 162 Mont. 506, 513 P.2d 268 (1973); Kohler v. Ford Motor Co., 187 Neb. 428, 191 N.W.2d 601 (1971); Stang v. Hertz Corp., 83 N.M. 730, 497 P.2d 732 (1972); Johnson v. American Motors Corp., 225 N.W.2d 57 (N.D. 1974); Ritter v. Narragansett Elec. Co., 109 R.I. 176, 283 A.2d 255 (1971); Engberg v. Ford Motor Co., 87 S.D. 196, 205 N.W.2d 104 (1973).

8. Principal reforms typically sought include a return to a fault-based system of liability, abrogation or modification of the joint and several liability rule, clear standards for the recovery of punitive damages, reasonable limitation of damage awards for non-economic injury, reform of the "collateral source" rule and the reduction or elimination of awards to persons harmed by reason of voluntary alcohol or drug ingestion.

9. The concept of strict liability was first articulated in a concurring opinion filed by newly-appointed California Supreme Court Justice Traynor in *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944).

separate rural roadways that intersect at some point could collide at that intersection, and that in the collision their occupants could be injured. Let us then assume this hypothetical two-car collision at an uncontrolled rural intersection.¹⁰ Let us suppose that the same crash occurs ten times. Let us then hypothesize that each of these ten collisions is identical in all respects. The automobiles will be identical; the velocities, vehicular masses, angles of impact, occupant numbers and sizes, occupant kinematics, tire-to-road coefficients of friction and all other factors will be identical. Thus, the presumed human injuries will be identical.

One of the collisions is presumed to occur in each of the following advanced industrial nations:

Australia
Belgium
England
Federal Republic of Germany
France
Japan
New Zealand
Sweden

The two remaining collisions are presumed to occur in contiguous states that lie at the center of the United States: one in Missouri and the other in Kansas. To eliminate needless conflicts of law, intra-national facts are presumed for each foreign case and intrastate facts for each United States case.

Four of the nations whose laws we shall examine are members of the European Economic Community (EEC), part of the Council of the European Communities (EC).¹¹ In 1985, the Council adopted a Directive¹² intended to harmonize "the laws of the member states concerning" product liability.¹³ By July 31, 1988, product liability laws in these four nations will have been changed in various respects to conform with the Directive. This article examines both the effect of present product liability law and the likely 1988 modifications in

10. The rural setting obviously has no particular legal significance. It is selected merely because a virtually identical environment is present in each of the ten jurisdictions whose laws are to be examined.

11. The four are Belgium, France, Germany and the United Kingdom.

12. 25 O.J. EUR. COMM. (No. L 210) 29 (1985) (EEC Product Liability Directive 85/374 (EEC)) [hereinafter Directive].

13. *Id.* preamble.

these four nations.¹⁴

Much of the debate regarding the proper scope of product liability law, in the United States and elsewhere, involves the availability of insurance.¹⁵ Let us then examine the ten applications of product liability law to the hypothetical collision *from the viewpoint of a prudent international insurer*, one that intends and hopes to remain solvent.

As a matter of incidental interest, automotive accident statistics both in the United States and elsewhere clearly demonstrate that defects present when motor vehicles are new (the usual subjects of products litigation) are but an infinitesimally small contributor to highway death and injury.¹⁶ The leading contributors are: (1) driving under the influence of alcohol,¹⁷ and, (2) the failure to employ available restraints—that is, seat or safety belts.¹⁸ As the litigation risks for manufacturers and their insurers in the various nations are examined, the sanctions, if any, imposed for these two leading causes of highway death and injury, each of which will be found in the hypothetical case, will also be examined.

To avoid needless repetition, the hypothetical facts are stated only once, in the following paragraph. The reader is asked to con-

14. See *infra* text accompanying notes 108-92.

15. See, e.g., *Product Liability Reform: Hearings on S. 2631 Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science, and Transportation*, 97th Cong., 2d Sess. 85-86, 88 (1982) [hereinafter *Hearings on S. 2631*] (statement of C. Bendorf, President, Ass'n of Trial Lawyers of Am.); *Product Liability Reform Act: Hearings on S. 2760 Before the Comm. on the Judiciary*, 99th Cong., 2d Sess. 302-03 (1986) [hereinafter *Hearings on S. 2760*] (statement of R. Habush, Ass'n of Trial Lawyers of Am.); *Uniform Product Safety Act of 1987: Hearings on H.R. 1115 Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 90 (1987) [hereinafter *Hearings on H.R. 1115*] (statement of R. Habush, Ass'n of Trial Lawyers of Am.).

16. See, e.g., Treat, *A Study of Precrash Factors Involved in Traffic Accidents*, 10 HSRI RESEARCH REV. 1 (1980).

17. See, e.g., NATIONAL CENTER FOR STATISTICS AND ANALYSIS, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEPT. OF TRANSPORTATION, DRUNK DRIVING FACTS 1 (1986):

During the period 1982 through 1985, approximately 95,000 people lost their lives in alcohol-related traffic crashes Traffic crashes are the greatest single cause of death for people between the ages of five and thirty-four. More than half of these fatalities are alcohol-related In 1985, approximately 43,800 people died in traffic crashes [and] an estimated 51 percent were alcohol-related (22,360 deaths).

Id. In October 1987, the Center announced that alcohol-related traffic deaths in 1986 increased to 23,990. *Deaths From Drunken Driving Increase*, N.Y. Times, Oct. 29, 1987, at 12, col. 1.

18. See, e.g., NATIONAL CENTER FOR STATISTICS AND ANALYSIS, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEPT. OF TRANSPORTATION, OCCUPANT PROTECTION FACTS 1 (1987). "At the high use levels achieved in some other countries (85%), belts could have saved 10,000 lives if all States had belt laws in 1986." *Id.*

sider the same hypothetical case, *seriatim*, with appropriately substituted place names before each of the succeeding legal analyses.

II. FOREIGN PRODUCT RELATED ACCIDENT CLAIMS

A. New Zealand¹⁹

A, a New Zealand national, was driving his automobile along a highway in New Zealand. As *A* approached an uncontrolled rural intersection, his car was struck by a car driven by *B*, also a New Zealand national. *A*'s right leg was crushed and he suffered other serious orthopedic injuries, for which he was hospitalized several weeks. Shortly after the accident, a scientifically and legally proper intoxication test was administered to *B*. The test demonstrated a blood alcohol concentration of 0.08%. Neither *A* nor *B* was wearing his available lap-shoulder restraint. Neither was driving in the course of his employment. After the collision, the transaxle on *A*'s car was found broken. *A*'s car was built in New Zealand by *C* company, a New Zealand corporation, and sold by *C* to an authorized New Zealand dealer, who sold the car new, in New Zealand, to *A*. Among the private records of *C* company there is a document written by a New Zealand national, an automotive design engineer in *C*'s employ who worked on the design of this car model. It says:

There is concern among several of us that the metal to be used for this transaxle is not so strong as in previous model cars, so we are concerned that it may not be able to endure repeated road stresses.

This weaker material might fail in use and cause serious accidents.

There is nothing in *C* company records to indicate whether the engineers' concerns were resolved. *A*'s extensive medical costs were paid in part by proceeds from a private medical insurance policy *A* had with *D* company.

E insurance company is product liability insurer to the manufacturer *C* company. If *A* files a product liability action against *C* company, what is the extent of *C*'s risk? That is, what could the outcome be, under New Zealand law? Because *E* is a financial organization and premiums are calculated and paid in monetary units, the answer should be stated in financial terms. That is, for *E* to perform rational rate-making, it has to know not only whether *C* is likely to lose the case but how much *C* is likely to be required to pay if it does lose.

19. The author relied upon the assistance of Rudd, Watts & Stone, Barristers & Solicitors, Wellington, for the interpretation of New Zealand law.

And, of incidental interest, what civil or criminal sanctions, if any, are likely because *B* had a 0.08% blood alcohol level and neither *A* nor *B* was safety belted?

Any such attempted lawsuit for personal injury by *A* against *C* would be dismissed summarily in New Zealand, a common law country. Perhaps heeding the ancient philosopher,²⁰ New Zealand prohibited court proceedings for personal injury by accident years ago.²¹ The costs of *A*'s medical care will be borne by the national compensation system for accident victims.²²

For property damage claims, however, traditional common law rules would apply.²³ Thus, there could be an action for property damage.²⁴ *A* could claim that some defect in his car caused the accident and thus the extensive damage to it. To prevail in that proceeding, *A* would have to show that *C* was negligent in some way in its manufacture of *A*'s car.²⁵ An insurer may choose to investigate to see whether there was the expectation of and the opportunity for intermediate inspection of *A*'s car by the selling dealer or pursuant to a maintenance schedule, for the existence of either will exonerate *C*.²⁶

The engineer's comment would be subject to production in such a case.²⁷ Since the document is several years old, counsel for *C* and *E* would want to interview him to learn whether the somewhat vague fears he expressed then have any relevance to this accident and, if so, whether subsequent field experience has shown the fears to have been well-founded or groundless. The jury that hears the case, if one is brought, certainly would hear expert testimony on that point.

B could file a similar action against our client *C*, but *B* had a 0.08% blood alcohol level. If that was the basis of a blood alcohol charge, *B*'s insurer could refuse to pay for the damage *B* caused to

20. See CONFUCIUS, CONFUCIAN ANALECTS, THE GREAT LEARNING, AND THE DOCTRINE OF THE MEAN, BK XII, ch. XIII (Dover ed. 1971). The Master said, "In hearing lawsuits I am like any other body. What is necessary, however, is to cause the people to have no litigations." *Id.*

21. Today's statute is the successor to legislation that was first effective in 1974: "[w]here any person suffers personal injury by accident in New Zealand . . . no proceedings for damages arising directly or indirectly out of the injury . . . shall be brought in any court." Accident Compensation Act, 1982, N.Z. Stat. 27.

22. *Id.* §§ 72-77. Any claim of the private insurer, *D.*, would not be recoverable against *C.* *Id.* § 27(1).

23. *E.g.*, *Grant v. Australian Knitting Mills Ltd.* 1936 A.C. 85.

24. *See supra* note 19.

25. *Id.*

26. *E.g.*, *Guardian Royal Exch. Assurance of N.Z. Ltd. v. Stuart* 1985 N.Z.L.R. 596.

27. *See supra* note 19.

A's car. However, that would not affect *C*. *B*'s property damage case against *C* could proceed on the same legal basis as *A*'s case: that *C*'s negligence in manufacture caused the accident. However, if the jury were to find *B* negligent, that would reduce his damages in proportion to his assessed fault.²⁸

The extent of *C*'s risk, and thus that of *E* insurance company, is at most the value of *A*'s and *B*'s cars, together with assessed costs and disbursements. If each car was nearly new, the total typically would not exceed \$70,000(N.Z.).²⁹

On a question of incidental interest, drunken driving, *B* was indeed fortunate. His blood alcohol level of 0.08% was at the highest level possible that would not involve New Zealand's criminal penalties.³⁰ If his blood alcohol level had been higher than 0.08%, *B* would have lost his driver's license for at least the mandatory minimum of six months.³¹ In addition, he could have been fined up to \$1,500(N.Z.)³² and even imprisoned for up to three months.³³

The failure of *A* and *B* to wear seat belts likely resulted in the imposition of fines, though only in the amount of \$25(N.Z.).³⁴ New Zealand adopted a seat, or safety, belt usage law in 1972.³⁵ It was the second nation in the world to do so.³⁶

B. Sweden³⁷

1. Personal Injury

In the unlikely event that *A* attempts to bring a personal injury case against *C* corporation, *C* will have no ultimate loss. For a number of years now, every Swedish motor vehicle owner has been

28. See *supra* note 19.

29. The value of this amount in U.S. dollars, at the exchange rate \$1(N.Z.): \$.66(U.S.), is \$46,200(U.S.).

30. Transportation Act, 1962, N.Z. Stat. §§ 30, 58.

31. *Id.*

32. The value of this amount in U.S. dollars, at the exchange rate \$1(N.Z.): \$.66(U.S.), is \$990(U.S.).

33. See *supra* note 30.

34. *Id.*

35. Traffic Regulations, 1976, S.R. 30B (2); Transportation Act, 1962, N.Z. Stat. Second Sched., Pt. 3; see also NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATON U.S. DEP'T OF TRANSPORTATION, EFFECTIVENESS OF SAFETY BELT USE LAWS 20 (1986) (report of T. Vaaje) [hereinafter EFFECTIVENESS].

36. EFFECTIVENESS, *supra* note 35, at 13-14.

37. The author relied upon the assistance of Carl Swartling Advokatbyrå, Stockholm, for the interpretation of Swedish law.

required to have a traffic insurance policy.³⁸ The costs resulting from *A*'s personal injuries will be fully paid by Sweden's mandatory social security insurance program and by the traffic insurance policy that covers *A*'s car.³⁹

Because *A* can readily collect from his own traffic insurer, *A* would have no reason to sue *C* company. Even if *A* sued and won, however, *C* would be entitled to full reimbursement by *A*'s traffic insurer.⁴⁰ There is a technical exception apparently irrelevant here: if *C* company were found grossly negligent, it could not have reimbursement.⁴¹ However, there is no evidence of that in this case.

B might be financially motivated to sue *C* on the ground that some defect in *A*'s car, manufactured and sold by *C*, caused the accident and thus *B*'s injuries. This is especially likely because *B*'s 0.08% blood alcohol level means he will probably be unable to recover from his own traffic insurance policy.⁴² However, his blood alcohol level also will prevent his recovery against *C* by reason of the Swedish Tort Liability Act of 1972.⁴³

2. Property Damage

In Sweden, the damage to *A*'s car is payable not by *A*'s traffic insurer, but rather by *B*'s, but only if *B*'s fault or a defect in *B*'s car caused the collision.⁴⁴ Since *B* (at 0.08%) had well over the minimum 0.05% blood alcohol level that constitutes drunken driving under Swedish law,⁴⁵ *B* will very likely be found at fault. If he is not, of course, *A* would receive nothing from *B*'s insurer, and then *A* might seem motivated to sue *C* for the property damage, alleging that some defect in the car caused the collision and thus the damage to it. However, in Sweden, damage to the product itself (*i.e.*, *A*'s automobile) would not be recoverable under any product liability theory.⁴⁶

38. Swedish Traffic Damage Act of 1975, § 2. There are technical exceptions not relevant here, such as those for vehicles that cannot be used in traffic.

39. *Id.* § 10; Swedish National Insurance Act, 1962. *A*'s medical and other costs relating to his personal injuries would not be payable by his traffic insurer if *A* was guilty of willful misconduct, grossly negligent or simply negligent while drunk (0.05% blood alcohol or more). There is no evidence of that here, however.

40. See *supra* note 37.

41. *Id.*

42. *B* is likely to be found to have been negligent while drunk, and that defeats recovery.

43. Swedish Tort Liability Act, 1972, ch. 6, § 1.

44. Swedish Traffic Damage Act, 1975, § 10.

45. Swedish Traffic Crime Act, 1951, § 4.

46. See Report, Products Liability Committee (SOU 1979:79), at 27-35; Report, Con-

Again, *B* must be considered. The damage to his car is payable by *A*'s traffic insurer if a defect in *A*'s car caused the crash.⁴⁷ If *B* proves that claim and *A*'s traffic insurer pays, that insurer might consider seeking reimbursement from *C* company. However, *C* will be liable only if *A*'s traffic insurer shows *C* to have been grossly negligent.⁴⁸ That seems extremely unlikely here. Therefore, *C* faces virtually no financial risk.

As to the questions of incidental interest, *B* likely faced a criminal trial with a mandatory one month period of incarceration upon conviction, as well as suspension of his driving privileges, because of his 0.08% blood alcohol level.⁴⁹ The failure of *A* and *B* to wear seat belts likely resulted in the imposition of fines.⁵⁰

C. Australia⁵¹

As will be shown below, *A* can sue *C* company in most Australian jurisdictions, and his cause of action is likely to resemble the one that would be filed in a number of other common law countries.

1. Negligence

To make out a negligence action against *C*, *A* must show, pursuant to traditional common law principles, that it was *C* company's duty to use reasonable care in the manufacture and design of *A*'s car, that *C* breached that duty and that *C*'s failure to exercise reasonable care caused *A*'s injury.⁵²

One cannot know whether *A* will contend that it was the transaxle that caused the accident. However, if *A* alleges that *C* breached its duty of care by making a defective transaxle, then the engineer's report will be discoverable.⁵³ *A* may be expected to call expert wit-

sumer Sales Act Committee (SOU 1984:25), at 186-98, and Supreme Court cases cited therein. The vehicle, and not merely some part of the vehicle, would be considered the product.

47. *Supra* note 37.

48. Swedish Traffic Damage Act, 1975, § 20.

49. Swedish Traffic Crime Act, 1951, § 4; Swedish Driver's Licenses Act, 1977, § 16. The sanctions can vary, however, and *B* could upon conviction be ordered to pay a criminal fine, or he could be incarcerated for a longer period of time—up to six months.

50. Swedish Road Traffic Ordinance, 1972, §§ 117a, 164; see EFFECTIVENESS, *supra* note 35, at 20. Sweden has had a seat belt usage law since 1975. *Id.*

51. The author relied upon the assistance of Malleons Stephens Jacques, Melbourne, for the interpretation of Australian law.

52. See, e.g., *Donoghue v. Stevenson*, 1932 A.C. 562, 580.

53. See, e.g., *Rockwell Machine Tool Co. v. F. P. Barrus (Concessionaires) Ltd. and Ors.*, 2 All E.R. 98, 99 (1968).

nesses and *C* company personnel. The claim may be that the transaxle was defectively designed, manufactured or assembled.

In Australia, the court, in determining whether *C* breached its duty of care, will consider:

- (1) the likelihood of the risk materializing;
- (2) the likely seriousness of its consequences if it did;
- (3) the cost of guarding against the risk; and
- (4) the social utility of *C* company's activity (*i.e.*, manufacturing automobiles).⁵⁴

To determine the final element of causation, an Australian judge will employ the traditional common law *sine qua non* or "but for" test.⁵⁵ Here, investigation of all the accident circumstances will be imperative for the insurer of *C*. The transaxle may not have been defective at all but simply may have broken in the midst of the violent collision. Negligent driving by *A* or *B*, or both, may have been the cause of the crash. *B*'s alcohol level may well indicate that he was negligent in his driving; an investigation should show whether he was. *A*'s failure to wear his safety belt, if that failure enhanced his injuries, may amount to contributory negligence, thus defeating recovery.⁵⁶

If *A* alleges a defect in the transaxle, then the insurer would need to learn whether *C* made the transaxle or purchased it from an outside entity. If it was the latter, a judge could reasonably determine that even though *C* did not make this component, *C* knew or should have known of a defect in it and yet failed to take reasonable steps to avoid the consequences, such as warning customers or conducting a recall campaign. If those facts are proven, the court can hold *C* liable even though it did not make the transaxle.⁵⁷

2. Deceit

This claim, if made by *A*, would be based upon the express warranty that *C* gave *A*, upon the initial sale of the car to *A*. One would therefore review the terms of that warranty. *A* would be required to show that *C* or its agent made a knowingly false representation of fact with the intention that *A* or people similarly situated would act on it

54. See, e.g., *Bolton v. Stone*, [1951] A.C. 850; *Paris v. Stepney Borough Council*, [1951] A.C. 367; *Watt v. Hertfordshire County Council*, 2 All E.R. 368 (1954).

55. See, e.g., *Cork v. Kirby MacLean Ltd.*, 2 All E.R. 402, 407 (1952).

56. See *supra* note 51.

57. See, e.g., *Watson v. Buckley*, 1 All E.R. 174 (1940); *Clarke v. Army & Navy Coop. Soc'y Ltd.*, [1903] 1 K.B. 155.

to their detriment, and that in fact *A* did so act.⁵⁸ On the facts, this claim seems at most a remote possibility.

C's insurer would want to learn where in Australia this accident occurred, so that it might have a better idea where *A* might try to bring an action against *C*.

3. Certain Statutory Limits on Tort Claims

The Northern Territory has an accident compensation system quite similar to the one in effect in New Zealand.⁵⁹ *A* would be unable to sue *C* or anyone else if *A* is a resident of the Territory and the accident occurred there.⁶⁰ Rather, *A* would receive compensation under the Northern Territory statutory scheme.⁶¹

C also may be effectively immune from liability if the State of Tasmania proves to have been involved in certain ways. These are:

- (1) *A* was a resident of Tasmania and the accident occurred there;
- (2) *A* was a resident of Tasmania and the car he was driving was registered there (regardless of where in Australia the accident occurred); or
- (3) The accident occurred in Tasmania and the car *A* was driving was registered there (regardless of *A*'s residency).⁶²

If one of those fact situations existed, *A* doubtless would have received the prescribed benefits from the Tasmania Motor Accidents Insurance Board.⁶³ Unlike the situation in the Northern Territory, *A* could nevertheless sue *C* in a Tasmanian court, but because double recovery is prohibited,⁶⁴ *C*'s (and therefore *E*'s) financial risk obviously would be minimal.

If the accident occurred in the State of Victoria, one would need to consider the likely effect of new legislation there.⁶⁵ Under this legislation, *A*, a person injured in a "transport accident,"⁶⁶ is entitled to benefits, including loss of earnings, medical and associated expenses

58. See, e.g., *Edgington v. Fitzmaurice*, 29 Ch. D. 459 (1885).

59. See *supra* notes 21-22 and accompanying text.

60. Motor Accidents Compensation Act, 1979, N. Terr. Austl. Ord., § 5. "[N]o action for damages shall lie in the Territory in respect of the death of or injury to a resident of the Territory in or as a result of an accident that occurred in the Territory." *Id.*

61. *Id.*

62. Motor Accidents (Liabilities and Compensation) Act, 1973, TAs. SESS. STAT., part IV.

63. *Id.* § 23 (1).

64. *Id.* § 27.

65. Transport Accident Act, 1986, Vict. Stat., R. Regs. & B.

66. *Id.* § 35(1).

and a lump sum for bodily impairment.⁶⁷

In the subject accident, *A*'s right leg was crushed and he suffered other serious orthopedic injuries for which he was hospitalized several weeks. One therefore would need to consider whether *A* would likely be found thirty percent or more disabled under the Act.⁶⁸ If, upon assessment he is,⁶⁹ then he would have a "serious injury" and may sue *C* (and others) in spite of the Act.⁷⁰ However, he may recover pecuniary losses only up to a maximum of \$450,000(Austl.)⁷¹ and "pain and suffering" damages only to a maximum of \$200,000(Austl.).⁷²

Thus, if the accident occurred in Victoria, *C*'s maximum exposure would be \$650,000(Austl.),⁷³ together with interest from the accident to the date of the award.⁷⁴ And, if *A* did obtain judgment against *C*, he would be ordered to repay to the Transport Accident Commission compensation payments he had already received.⁷⁵ In the case at hand, the financial risk does not seem nearly so large as \$650,000(Austl.).

4. Contract

A could bring an action against *C* in contract. A contract action may be brought under the Trade Practices Act of 1974, on the ground that a causative defect in the car rendered it not of merchantable quality,⁷⁶ but that would be unusual in an Australian personal injury case.⁷⁷

5. Damages

In any event, the ultimate financial risk to *C* and thus to its insurer, *E*, for property damage and personal injury to *A* appears to be about \$150,000(Austl.).⁷⁸

67. *Supra* note 65.

68. *Id.* § 47.

69. *Id.*

70. *Id.* § 93 (2), (3).

71. *Id.* § 93 (7).

72. *Id.*

73. The value of this amount in U.S. dollars, at the exchange rate \$1(Austl.): \$.75(U.S.), is \$487,500(U.S.).

74. Transport Accident Act, 1986, Vict. Stat., R. Regs. & B, § 93 (15).

75. *Id.* § 93 (11).

76. *See, e.g.,* Cehave NV v. Bremer Handelsgesellschaft mbl, [1976] 1 QB 44.

77. *See supra* note 51.

78. The value of this amount in U.S. dollars, at the exchange rate \$1(Austl.): \$.75(U.S.), is \$112,500(U.S.).

6. Incidental Interest

As to the questions of incidental interest, *B* may have been charged criminally because of his 0.08% blood alcohol level.⁷⁹ We have seen that *A*'s failure to wear a seat belt may amount to contributory negligence and thus wholly defeat recovery. In addition, the failure of *A* and *B* to wear seat belts probably resulted in the imposition of fines.⁸⁰ The State of Victoria was the first jurisdiction in the world to adopt safety belt usage laws.⁸¹ These laws have been in effect since December, 1970.⁸² The other Australian jurisdictions followed suit during the next two years.⁸³ The police are noted for their vigorous enforcement of safety belt usage laws,⁸⁴ and in parts of the country, usage rates have exceeded ninety percent.⁸⁵ In Victoria and the Northern Territory, unpaid fines imposed for failure to wear seat belts can mean a jail sentence.⁸⁶

D. Japan⁸⁷

A could sue *C* company. *C*, upon learning of the claim, is likely to seek a compromise settlement with *A*, and *A* is likely to make the necessary concessions to ensure that. In addition to the general tendency of the Japanese to seek compromise, *C*'s concern for the preservation of its reputation and *A*'s likely concern over the expense, time and difficulty involved in a lawsuit against *C* will be powerful incentives toward early settlement. Indeed, there appear to be few Japanese case law precedents for a lawsuit by *A* against *C*.⁸⁸ Although theoretically, *A* may sue in tort and possibly also in contract, only a few product liability lawsuits are filed, and ninety-nine percent are

79. In every Australian jurisdiction except one, a blood alcohol level of 0.08% while driving constitutes a criminal offense. The one exception is the Capital Territory, where it is an offense to drive with a blood alcohol level *greater than* 0.08%. Motor Traffic (Alcohol and Drugs) Ordinance, 1977, Austl. Cap. Terr. Ord. § 19.

80. See EFFECTIVENESS, *supra* note 35, at 20.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 3 (conference comments of P. Milne). "[T]he Australian experience has relied upon consistent enforcement, with tickets issued for failure to comply with belt use laws being second in number only to speeding tickets." *Id.*

85. *Id.* at 12.

86. *Id.* at 15.

87. The author relied upon the assistance of Aoki, Christensen & Nomoto, Tokyo, for the interpretation of Japanese law.

88. *Id.*

settled.⁸⁹

A's tort action could be a claim for damages on the ground of an unlawful act.⁹⁰ To prevail, he must prove that *C* was negligent in that it manufactured a defective automobile. *A* is not likely to win such a case, as a practical matter, because of difficulty in proving *C*'s negligence.

The contractual claim would be that an implied contract arose at the time of sale, and that because the car was defective in some causal way, *C* failed to perform its contractual obligation.⁹¹ There is no reported case, however, in which a new car purchaser injured in a collision successfully used this provision in a lawsuit against the manufacturer.

In the unlikely event that *A* were to bring a lawsuit against *C* and prevail, the court would determine *A*'s damage award by referring to a published schedule promulgated by the Bar Association, the Automobile Liability Indemnity Law Enforcement Regulations or generally-accepted insurance company payment schedules.⁹² For the purpose of this risk analysis, the most generous schedule, that of the Bar Association, shall be used.

On the basis of the most extreme factual assumptions,⁹³ the financial risk to *C* could be about 75.4 million yen.⁹⁴ *A*'s private insurer, *D*, will be subrogated to *A*'s rights to the extent of its payments to *A*, and *A* will not be able to recover that amount because double recovery is prohibited.⁹⁵ This outside exposure estimate of 75.4 million yen includes the regulated fee for *A*'s lawyer, which in the case of the assumed total victory for *A*, would include both an initiation fee and a success fee,⁹⁶ for a total fee of about 6,627,520 yen.⁹⁷ *A* would have

89. *Id.*

90. Minpō (Civil Code), Law no. 11 of 1898, art. 709. For meaning of the term "unlawful" act, see explanation thereof. *Id.*

91. *Id.* art. 415.

92. *See supra* note 87.

93. The assumptions are that *A*'s medical and related expenses were 3 million yen; his annual income was 4.2 million yen, his right leg injury was 7th grade on the Labor Standard Bureau's table; he was hospitalized for three months, absent from work four months, and has residual nerve dysfunction; further, his automobile repair cost was 700,000 yen.

94. The value of this amount in U.S. dollars, at the exchange rate 1(Jap.): \$.0075(U.S.), is about \$565,500(U.S.).

95. *See supra* note 87.

96. *Id.*

97. The value of this amount in U.S. dollars at the exchange rate 1(Jap.): \$.0075(U.S.), is about \$49,706(U.S.).

no right to make a "punitive" or "exemplary" damage claim.⁹⁸

We have proceeded thus far upon the assumption that the judge would find no fault whatever on the part of *B*. But *B* had a 0.08% blood alcohol level, and thus *B* may well have been at least partially responsible, even if a defect in *A*'s car also was a cause of his injuries. In addition, *A*'s damages may be reduced because of his failure to wear a safety belt.

Suppose the judge finds that *C* company was sixty percent at fault and *B* was forty percent at fault, which is something a Japanese judge may do.⁹⁹ *C* would be liable to pay only sixty percent of the 75.4 million yen assumed, or 45.24 million yen.¹⁰⁰ *B* would pay the remainder if he were able to do so.¹⁰¹ If not, *C* must pay it all, pursuant to the Japanese equivalent of the joint and several liability doctrine.¹⁰² However, *E*, *C*'s insurer, would be legally required to reimburse *C* only the sixty percent, the amount imposed in the first instance by the court.¹⁰³ *C* company would itself bear the burden of the remaining forty percent (*B*'s share that *B* could not pay). Any percentage fault attributable to plaintiff *A* would result in a proportionate decrease in his damage award.¹⁰⁴

As to the questions of incidental interest, *B* likely faced a jail sentence of up to three months and a fine of up to 30,000 yen because of his 0.08% blood alcohol level.¹⁰⁵ In addition, depending upon his driving record, *B* could have had his license revoked or suspended for up to six months.¹⁰⁶

The failure of *A* and *B* to wear seat belts likely resulted in the imposition of an administrative point penalty against each.¹⁰⁷

98. See *supra* note 87.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. Road Traffic Law, art. 65, ¶ 1 (7)-2 1970, Cabinet Order No. 226 (Jap.); Road Traffic Law Enforcement Regulations, art. 44-3, 1970, Cabinet Order No. 227 (Jap.). The value of 30,000 yen in U.S. dollars, at the exchange rate 1(Jap.): \$.0075(U.S.), is \$225(U.S.). In Japan, the legal blood alcohol limit is 0.05%. *Id.*

106. Road Traffic Law, art. 90, ¶ 3 1970, Cabinet Order No. 226 (Jap.); Road Traffic Law Enforcement Regulations, art. 33-3, ¶ 1 1970, Cabinet Order No. 227 (Jap.).

107. Road Traffic Law, art. 71-2, 1985, Cabinet Order No. 218 (Jap.); Road Traffic Law Enforcement Regulations, art. 33-3, ¶ 1, scheds. 1, 2, 1970, Cabinet Order No. 227 (Jap.).

*E. Belgium*¹⁰⁸

Even under present, pre-Directive Belgian law, *A* could sue *C* company in both tort and contract.¹⁰⁹

A's tort theory would be that his car had some hidden defect that caused his injuries.¹¹⁰ His theory in contract would be that the defect made it impossible for the car to be used in the way that an ordinary purchaser would contemplate.¹¹¹

Further evaluation of this lawsuit, if filed, must await further investigation of the accident facts. In Belgium, a serious traffic accident like this one would have to be investigated by the police. Indeed, the police are likely to appoint an expert to assist in the investigation. The criminal investigation report is available to the parties.¹¹² If *A* sues *C*, *C*'s insurer would likewise be able to review this report.¹¹³

Even if *A* can show only that his car was defective—without showing the defect caused his injuries in this collision—he will be entitled to an order that cancels the sale and reimburses him for the purchase price of the car.¹¹⁴

For *C* to be required to pay for *A*'s personal injuries, *A* must convince the judge that, under the Belgian interpretation of the civil law's "theory of equivalence of conditions,"¹¹⁵ every accident circumstance without which the damages would not have occurred as they did occur was a cause of the damages,¹¹⁶ and such a circumstance necessarily would be the defective condition of *A*'s car.

A will be entitled to see *C*'s records and thus the report written by the engineer.¹¹⁷ At the trial, *A* will probably request expert testimony. The expert can be appointed by the court or the investigating police officer.¹¹⁸ The expert, if he finds that the defect was in the transaxle, may be expected to use *C*'s engineer's report to support his

108. The author relied upon the assistance of Cleary, Gottlieb, Steen & Hamilton, Brussels, for the interpretation of Belgian law.

109. See *infra* notes 110-11.

110. Judgment of Dec. 12, 1958, Cass., Pass., 1959, I, 383.

111. CODE CIVIL [C.Civ.] arts. 1615, 1641 (1804) (Belg.); see also 4 H. DE PAGE, TRAITÉ DE DROIT CIVIL, 146 and 186 (1972).

112. See *supra* note 108.

113. *Id.*

114. C. CIV., arts. 1615, 1641 (1804) (Belg.).

115. See 4 H. DE PAGE, TRAITÉ DE DROIT CIVIL, 955-64 (1972); 2 R. DALCQ, TRAITÉ DE LA RESPONSABILITÉ CIVILE, 2553-62 (1962).

116. *Id.*

117. See *supra* note 108.

118. *Id.*

testimony. *A* can, of course, sue *B* as well, and *B*'s blood alcohol level of 0.08% makes this especially likely.

The judge who hears the case may assign percentages of responsibility to *A*, *B* and *C* company. *A*'s recovery of money will be reduced directly by any percentage of responsibility assigned to him.¹¹⁹ If *B* and *C* each are assigned responsibility, *A* may collect the entire amount from either—that is, the rule of joint and several liability (*responsabilité in solidum*) generally applies in Belgium.¹²⁰ Of course, if *C* were thus required to pay more than its assigned share, it could recover the excess from *B*.¹²¹ Since all drivers in Belgium are required to have insurance,¹²² it is very likely that *C* would be able to make such a recovery.

The amount that a judge could award to *A* would include recovery for his medical expenses, his "moral damages" for suffering during the accident, in the hospital and thereafter, his temporary or permanent disability, and the damage to his vehicle.¹²³ While the amount a judge may award is not predictable with precision, in a case such as this, one might expect an award of no more than 9 million (Belg.)¹²⁴ and probably less. The other interested insurers, such as *D*, would be entitled to make indemnification claims, but *A* could not have a double recovery.¹²⁵

Belgium is regarded as one of the most favorable European jurisdictions for consumer lawsuits such as this one. Thus, the new EEC Directive will not significantly improve the rights of the consumer, except in regard to certain questions relating to applicable periods of limitations.

As to the questions of incidental interest, because of his 0.08% blood alcohol level, *B* is likely to face imprisonment of 15 to 90 days and a fine of 600 to 6,000 (Belg.).¹²⁶ In addition, a court could with-

119. Judgment of May 23, 1979, Cass., Pas., 1979, I, 1103.

120. See 4 H. DE PAGE, *TRAITÉ DE DROIT CIVIL*, 1032 (1972); see also J. FAGNART & M. DENEVE, *LA RESPONSABILITÉ CIVILE* (1976-1984), 27 (1985).

121. 4 H. DE PAGE, *TRAITÉ DE DROIT CIVIL*, 1032 (1972).

122. Law of July 1, 1956, regarding mandatory third party liability insurance in respect of motor vehicles, [*véhicules automoteurs assurance obligatoire* (L.), II 623], art. 2.

123. See *supra* note 108.

124. The value of this amount in U.S. dollars, at the exchange rate 1(Belg.): \$.029(U.S.), is about \$261,000(U.S.).

125. 4 H. DE PAGE, *TRAITÉ DE DROIT CIVIL*, 1033 (1972).

126. The value of these amounts in U.S. dollars, at the exchange rate 1(Belg.): \$.029(U.S.), is from about \$17(U.S.) to about \$174(U.S.).

draw *B*'s driving privileges for eight days to five years.¹²⁷ The failure of *A* or *B* to wear seat belts could have resulted in imprisonment from one day to one month, as well as a fine.¹²⁸

F. France¹²⁹

A could file a civil action against *C* company, even under pre-Directive French law, so long as he does so within a short period of time (*bref délai*).¹³⁰ *A* may sue either in tort or in contract, but not both.¹³¹ However, his proof requirements will be similar under either theory. The essential basis for the action would be that the car contained a hidden defect (*vice caché*)¹³² which caused *A*'s injuries. Under the forthcoming Directive legislation, *A*'s theory would be that the car did not provide the safety which a person is entitled to expect.¹³³

A will be able to sue for all of his damages, including unforeseeable damages, property damage and business and emotional harm. Before trial, it is highly unlikely that *A* will obtain the engineer's statement, for there is in France no evidentiary process that would be likely to result in the document's production. An expert appointed by the court would be likely to testify at the trial. If that expert finds that *A*'s car was defective and that the defect caused *A*'s injuries, the judge would likely find *C* liable, even if *C* shows that it could not in fact have discovered the defect, because the manufacturer is presumed to know of all hidden defects.¹³⁴

A can sue *B* as well. The judge may not, however, directly assign percentages of responsibility for the accident. Rather, if *C* is held liable for the entire judgment, it can seek contribution from *B*; at that

127. Law regarding the road traffic coordinated by Royal Decree of March 16, 1968, [Police de la circulation routière (A.R.)] arts. 34 & 38 (Belg.).

128. *Id.* art. 29; see also EFFECTIVENESS, *supra* note 35, at 20. Belgium has had a seat belt usage law since 1975. *Id.*

129. The author relied upon the assistance of Cleary, Gottlieb, Steen & Hamilton, Paris, for the interpretation of French law.

130. CODE CIVIL [C. Civ.] art. 1648 (1804) (Fr.). If the action is purely for breach of contract under art. 1146, however, the *bref délai* limitation would not apply to this case.

131. C. Civ. arts. 1146 & 1641 (1804).

132. *Id.*

133. Directive, *supra* note 12, art. 6.1.

134. C. Civ. art. 1643 (1804); Judgment of Jan. 19, 1965, Cass. civ. I re, Fr., 1965 Recueil Dalloz [D.S. Jur.] 389; Judgment of Oct. 18, 1977, Cass. civ. 3e, Fr., 1977 Bulletin des Arrêts de la Cour de Cassation, Chambres Civiles [Bull. Civ. III] 347; Judgment of Feb. 25, 1981, Cass. com., Fr., 1981 Bulletin des Arrêts de la Cour de Cassation, Chambres Civiles [Bull. Civ. IV], 311; Judgment of May 3, 1983, Cass. com., Fr., 1983 Bull. Civ. IV 131.

point, relative degrees of fault would be determined.¹³⁵ If *B* cannot pay, however, *C* will bear the entire burden, for the rule of joint and several liability (*responsabilité in solidum*)¹³⁶ will apply. The Directive, too, provides for joint and several liability.¹³⁷ However, any fault on *A*'s part would be determined on a percentage basis by the judge and would directly reduce *A*'s recovery.¹³⁸ That fault could include *A*'s failure to wear his seat belt.¹³⁹

The damage award is within the discretion of the judge and the amount cannot be predicted exactly.¹⁴⁰ However, an award of more than 1 million francs seems unlikely.¹⁴¹ Even under the Directive legislation, the calculation of damages will continue to be done by French courts.¹⁴² If the insurer's policy with *C* includes a clause excepting liability in a design defect case, the insurer would be permitted to assert that in a French court.¹⁴³

As to the questions of incidental interest, *B* would face imprisonment of up to one year and a fine of 500 to 20,000 (Fr.)¹⁴⁴ because of his 0.08% blood alcohol level.¹⁴⁵ However, the victim's harm is relevant in French criminal law: if *A*'s disability exceeded three months, the sanctions imposed against *B* would be doubled.¹⁴⁶ The failure of *A* and *B* to wear safety belts could have resulted in the imposition of a fine of 230 (Fr.) against each.¹⁴⁷

G. Federal Republic of Germany¹⁴⁸

A can sue *C* in a West German court.¹⁴⁹ He may be expected to

135. See *supra* note 129.

136. *Id.*

137. See Directive, *supra* note 12, art. 3(3).

138. *Id.* ¶ 10,706.

139. Judgment of Oct. 3, 1979, Cass. crim., Fr., 1980 D.S. Jur., 128; Judgment of Mar. 16, 1977, Cass. crim., Fr., 1977, D.S. Jur., 469.

140. See *supra* note 129.

141. *Id.* The value of this amount in U.S. dollars, at the exchange rate 1(Fr.): \$.175(U.S.), is \$175,000(U.S.).

142. See Directive, *supra* note 12, ¶ 10,706.

143. *Supra* note 129.

144. The value of these amounts in U.S. dollars, at the exchange rate 1(Fr.): \$.175(U.S.), is \$87.50(U.S.) to \$3,500(U.S.).

145. CODE PÉNAL [C. PEN.] art. 320 (1977) (Fr.).

146. *Id.*

147. CODE DE PROCÉDURE PÉNAL [C. PR. PEN.] art. R 49 (1986) (Fr.); France has had a seat belt usage law sine 1973. See *supra* note 129.

148. The author relied upon the assistance of Boden, Oppenhoff & Schneider, Köln, for the interpretation of German law.

149. *Id.*

allege that a defect in his car caused his injuries. *A* may also sue *B*.

In practice, *A* will have been indemnified for medical and related costs by reason of the extensive social security programs in the Federal Republic.¹⁵⁰ Thus, lawsuits against *C* could be brought by various insurers and social security agencies that are subrogated to *A*'s rights, as well as by *A* himself.¹⁵¹

A successful pre-Directive action against *C* must include proof that *C* was at fault. However, even after implementation, if there was indeed a causative defect, but *C* can show that under the state of research and technology at the time *A*'s car was made, *C* could not have recognized the defect, *C* will be exonerated.¹⁵²

The likely basis for an action against *C* is a case sounding in tort and founded upon a specific statute.¹⁵³ At the trial, *C* as a practical matter will bear the burden of showing that it was not at fault for *A*'s injury.¹⁵⁴ *C* today is free to prove that, even if the defect could have been detected, it carefully selected and supervised all those responsible for the product's design and manufacture and used adequate quality control procedures.¹⁵⁵ This will not be an available defense after implementation of the Directive.¹⁵⁶

The amount that a pre-Directive judge might award to *A* (and his subrogees) could include medical expenses, present loss of income, future loss of income¹⁵⁷ and damages for pain and suffering, as well as property damage.¹⁵⁸ Under the Directive, claims will be for pecuniary damages, not pain and suffering and the like.¹⁵⁹ *A*'s own fault, by reason of his own negligence, can diminish or even wholly defeat recovery,¹⁶⁰ before and after the Directive. *A*'s negligence certainly could include his failure to wear a safety belt so long as that failure contributed to his injuries.

150. *Id.*

151. *Id.*

152. *See supra* note 148. After the Directive is implemented, a manufacturer in the Federal Republic will not be held liable if it is able to prove that under the state of research and technology at the time the product was introduced into commerce, the defect could not have been detected. Directive, *supra* note 12, art. 7(e).

153. BÜRGERLICHES GESETZBUCH [BGB] § 823 (1900) (W. Ger.).

154. *See supra* note 148.

155. *Id.*

156. *See* Directive, *supra* note 12, art. 7(a)-(d).

157. BGB § 843 (1900) (W. Ger.).

158. *Id.* § 847.

159. *See* Directive, *supra* note 12, art. 9.

160. BGB § 254 (1900) (W. Ger.).

While it is impossible to state with precision the amount that a judge would award, an award of more than 200,000(W. Ger.)¹⁶¹ and a monthly pension of 800(W. Ger.) per month¹⁶² seems unlikely given the presumed injury, assuming normal medical costs and losses of income for such an injury.

As to the questions of incidental interest, *B*'s 0.08% blood alcohol level constituted a criminal offense.¹⁶³ The fine imposed could have been as much as 3,000 (W. Ger.).¹⁶⁴ In addition, *B* may have been prevented from driving for up to three months by reason of his 0.08% blood alcohol level.¹⁶⁵

In addition, however, *B* could have been convicted under the Penal Code if his intoxication contributed to the accident and *A*'s injuries.¹⁶⁶ His punishment could have included a fine of forty-five to sixty day's income and cancellation of his driving privileges for perhaps nine months.¹⁶⁷

The failure of *A* and *B* to wear seat belts constituted an offense¹⁶⁸ and likely resulted in the imposition of fines.¹⁶⁹ The fine for each could have been as high as 1,000(W. Ger.).¹⁷⁰

H. England¹⁷¹

A can file a lawsuit against *C* company.¹⁷² The action will not lie in contract,¹⁷³ for *A* and *C* are not in privity, *A* having purchased the car from a dealer.¹⁷⁴ The likely action against *C* would sound in tort

161. The value of this amount in U.S. dollars, at the exchange rate 1(W. Ger.): \$.60(U.S.), is \$120,000(U.S.).

162. At the exchange rate 1(W. Ger.): \$.60(U.S.), this would equal \$480(U.S.) per month.

163. Road Traffic Act, § 24a Strassenverkehrsgesetz [STVG] (1973) (W. Ger.).

164. *Id.* At the exchange rate DM 1(W. Ger.): \$.60(U.S.), this would equal \$1,800(U.S.).

165. *Id.*

166. Penal Code § 230 Strafgesetzbuch [STGB] (1970) (negligent infliction of injuries) and § 315c StGB (1970) (negligently endangering road traffic) (W. Ger.).

167. *Id.*

168. Road Traffic Act, § 21a Strassenverkehrsordnung [STVO] (1985) (W. Ger.).

169. Road Traffic Act, § 24a StVG (1973) (W. Ger.); *see also* EFFECTIVENESS, *supra* note 35, at 20. The Federal Republic of Germany has had a seat belt usage law since 1976. *See supra* note 148.

170. At the exchange rate 1(W. Ger.): \$.60(W. Ger.), this would equal \$600(U.S.).

171. The author relied upon the assistance of Slaughter and May, London, for the interpretation of English law.

172. *Id.*

173. *Id.*

174. Should *A* sue the selling dealer in contract, of course, *C* could be sued in contract by the dealer seeking indemnification.

(negligence).¹⁷⁵ *A* will seek to show that *C* was negligent because there was a causative defect in the car.

C would have a valid defense if it could show that under the state of knowledge at the time it manufactured *A*'s car, the causative defect, even if there was one, could not reasonably have been discovered.¹⁷⁶ The defenses of contributory negligence and voluntary assumption of risk theoretically exist, but neither appears likely to be useful in the accident situation as described.

In the action, *A* will seek damages for his physical injury and economic losses arising directly from it. Damages are intended to compensate *A* for his pain and suffering, property damages, lost earnings and further additional expenses.¹⁷⁷

The judge, in his discretion, can order an unsuccessful party to pay some or all of the solicitors, barristers and adverse parties' costs and fees and other litigation costs.¹⁷⁸ In practice, certain costs will be disallowed, so that the losing party and its insurers may expect to pay between half and three-fourths of the costs of the other side.¹⁷⁹ Obviously, the losing party would in addition bear its own costs.

Contingency fees are not permitted.¹⁸⁰ As a matter of professional conduct, lawyers in the United Kingdom do not accept contingency fees because they are considered to produce the effect of an illegal bargain similar to champerty (lawyers would obtain a share of the proceeds for assisting a party in a lawsuit).

The United Kingdom adopted the EEC Directive in the 1987 Consumer Protection Act.¹⁸¹ Under it, strict liability applies.¹⁸² Thus, in the situation given, *A* would seek to show only that his car was defective because its degree of safety was "not such as persons generally are entitled to expect."¹⁸³ Other than that proof requirement, the risk *C* faces will not be significantly different under the new Act.¹⁸⁴ The state of the art defense is retained.¹⁸⁵

175. See, e.g., *Vacwell Eng'g Co. v. B.D.H. Chems. Ltd.* [1971] 1 QB 88.

176. See *supra* note 171.

177. *Id.*

178. See Rules of the Supreme Court, Order 62, Rule 3 (High Court actions).

179. See *supra* note 171.

180. *Id.*

181. Consumer Protection Act, 1987.

182. *Id.*

183. The Consumer Protection Act, 1987, § 3. *But cf.* Directive, *supra* note 12, art. 6.1.

184. See *supra* note 171.

185. There is a defense if "the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in ques-

Before trial, *C* will be compelled to disclose its relevant documents, and the engineer's report may well be produced. It does not conclusively prove negligence or liability, of course, but obviously it could be damaging to *C* if it is left unexplained. At the trial, various experts proffered by the parties will testify before the judge.

If the evidence is that *A*'s leg injury was so severe as to require amputation, with obvious continuing disability therefrom, an award of between £30,000 and £40,000 seems likely.¹⁸⁶ The award could be higher if *A* requires continued future nursing care and if his future earning capacity is affected. In addition to that, special damages would be awarded by the judge for quantifiable damages, such as the damage to *A*'s car, his medical expenses and actual loss of earnings.¹⁸⁷ Thus, for a total compensatory figure, one may presume as an upper limit the amount of £60,000.¹⁸⁸

An award of exemplary or punitive damages is unlikely. There is no authority that would suggest that such an award would be made in this case. When such awards are made, they are moderate in amount.¹⁸⁹

On the first question of incidental interest, drunken driving, *B* was as fortunate as his counterpart in New Zealand. His blood alcohol level of 0.08% was the highest level that would not invoke England's criminal penalties.¹⁹⁰ The failure of *A* and *B* to wear safety belts was a criminal offense.¹⁹¹ In addition, *A*'s damages would be reduced for his negligence if the evidence shows that his injuries were enhanced by the failure to wear his seat belt.¹⁹²

III. REFLECTIONS ON FOREIGN LAW

At this point, the following is what has been observed in the first eight of these advanced industrial nations.

One observes that judges seem to decide product liability disputes, with the exception of property damage cases in New Zealand.

tion might be expected to have discovered the defect in it if it had existed in his products while they were under his control." The Consumer Protection Act, 1987, § 4 (1) (e).

186. *Id.*

187. *Id.*

188. The value of this amount in U.S. dollars, at the exchange rate £1: \$1.85(U.S.), is \$111,000(U.S.).

189. *See supra* note 171.

190. Transport Act, 1981, § 25 (3), sched. 8.

191. Road Traffic Act, 1972, § 33(A); Transport Act, 1981, § 27; Motor Vehicles (Wearing of Seatbelt) Regulations, 1982.

192. *See supra* note 171.

Judges determine damages. On the hypothetical case facts, the insurer of *C* in each nation would face risks ranging from nothing in Sweden to perhaps \$32,500(U.S.) in New Zealand, around \$100,000(U.S.) in the other common law countries (England and Australia), and between \$150,000(U.S.) and \$250,000(U.S.) at the most in France, Belgium and the Federal Republic of Germany. In Japan, litigation would be exceedingly unlikely, and a settlement within the ranges just reviewed most likely. In each of the eight countries, the failure to wear safety belts would result in a penalty. *B*'s blood alcohol level of 0.08% would, upon conviction, result in a mandatory jail sentence in Belgium and Sweden, a likely jail sentence in France and Japan, and penalties everywhere else except England, New Zealand and one Australian jurisdiction—and even there 0.08% is the highest allowable limit. The contingent fee is nowhere to be seen, nor are punitive damages.

IV. UNITED STATES PRODUCT-RELATED ACCIDENT CLAIMS

In the United States, the legal system is very different. Although any U.S. jurisdiction would demonstrate the differences, let us utilize as examples the product liability laws of two contiguous jurisdictions in the center of the nation, Missouri and Kansas.

A. Missouri

A can sue *C* company. Missouri holds manufacturers "economically and socially responsible for injuries actually caused by the products they place for profit in the stream of commerce."¹⁹³ The lawsuit may be brought as many as five years after the accident with no penalty and no requirement that *A* give notice of the accident prior to the court filing.¹⁹⁴

A's case may be based upon negligence, strict liability, and implied warranty; indeed, it may be based upon all three. *A* may make multiple, internally-inconsistent defect claims. He may postulate that no defect caused the accident, but then assert that some defect in the design of the car increased the injuries he otherwise would have sustained in it.¹⁹⁵ *A* may claim defects in design, manufacture or assem-

193. *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 383 (Mo. 1986) (en banc) (emphasis omitted).

194. MO. ANN. STAT. § 516.120 (Vernon 1952).

195. This is the U.S. enhanced injury doctrine. See *Larsen v. General Motors Corp.*, 391 F.2d 495, 504 (8th Cir. 1968); Annotation, *Liability of Manufacturer, Seller, or Distributor of Motor Vehicle for Defect Which Merely Enhances Injury From Accident Otherwise Caused*, 42

bly, or simultaneously claim two or all three of them, and with respect to as many of the vehicle's 14,000 parts as he chooses. He may allege that a failure to warn of some danger in the use of the product renders *C* liable.

A may sue *B*, settle with him and proceed against *C*. *A*'s spouse can join in the same lawsuit, seeking damages for the loss of *A*'s services. Any punitive damage claim by *A* against *C* in the amount of many millions of U.S. dollars will be freely allowed by Missouri courts.¹⁹⁶

Whatever *A* alleges initially is subject to change at his attorney's election.¹⁹⁷ Indeed, that attorney will be bound to allege particular theories of recovery only after the conclusion of the entire trial, just before the jury is told by the judge the applicable principles of law.¹⁹⁸ It is that jury that will decide whether *A*'s automobile was defective and, if so, determine damages.

The time from the filing of the action until the trial actually begins, may extend up to several years. During that time, the insurer may expect to incur significant costs for factual investigations, particularly if *A* waits several years after the accident before filing his action so that the relevant facts are stale. The insurer may also expect to incur significant attorney fees during this extended period. If, at the end of that frequently long period of time the attorney for *A* desires to cease his prosecution of the matter, he may do so by the mere filing of a court paper.¹⁹⁹ In that event, neither the insurer nor *C* will have recourse against *A* for their accumulated costs, and *A*'s dismissal will have been "without prejudice," so that his attorney will be free to file the action anew within one year and begin the process again.²⁰⁰

If *A* ultimately fails in his action, he may be assessed certain minor court costs, but in no event will *A* be ordered to pay *C*'s, or *C*'s insurer's significant costs, including attorney fees. If *A* prevails, he will—under the contingent fee system that prevails in some form in

A.L.R. 3d FED 560 (1972 & Supp. 1987). In *Polk v. Ford Motor Co.*, 529 F.2d 259, 266 (8th Cir.), cert. denied, 426 U.S. 907 (1976), a federal court first predicted Missouri would adopt the doctrine. No Missouri appellate court has yet done so. However, such claims are permitted routinely in Missouri trial courts.

196. *Rinker v. Ford Motor Co.*, 567 S.W.2d 655, 668-69 (Mo. Ct. App. 1978) (actions which give rise to liability of a corporate employee may also impose punitive damages on the corporate employer).

197. MO. REV. STAT. § 55.33(a) (1987).

198. *Id.*

199. MO. REV. STAT. § 67.01 (1987).

200. *Id.*

all 50 of the U.S. states but is unheard-of or flatly illegal virtually everywhere else in the world—be compelled to give about forty percent of the recovery to his attorney. Thus, if the judgment is for \$2.5 million, the lawyer's share is about \$1 million.

A will, as noted earlier, contend that his car was causally defective and unreasonably dangerous. The Missouri jury will be free in its private deliberations to define those terms as it likes.²⁰¹ A Missouri appeals court recently held that the "absence of a safety factor may constitute a dangerous condition and therefore be defective,"²⁰² but did not define those terms. A Missouri jury is "free to infer that an alternative design would have been safer and would have prevented [the] accident,"²⁰³ but it need announce its decision only to that effect, not what that design might be.

As in most U.S. jurisdictions, the plaintiff here will be free to offer expert testimony of highly dubious value.²⁰⁴ Thus, the jury, inevitably comprised of six persons with very little likelihood that any one of them would qualify in court, even under the most lax qualifications, as an expert witness in the relevant technical disciplines, is given very wide latitude indeed in determining liability.

It would seem that under Missouri law, virtually no defenses are available to *C*, as a practical matter, if the jury determines the product to have been causally defective. For example, neither of the following, even if fully proven to the satisfaction of every juror, would constitute a legally valid defense:

—*A* misused the product (so long as this misuse was reasonably foreseeable).²⁰⁵

—*C* designed and manufactured the car to the state of the engineering art.²⁰⁶

A Missouri jury may compare the fault of *A*, *B* and *C* and assign

201. Missouri's highest court has elected to adopt neither the EEC Directive-like "consumer expectation" nor the "risk-utility" test for determining defect. See *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 382 (Mo. 1986).

202. *Baker v. International Harvester Co.*, 660 S.W.2d 21, 23 (Mo. Ct. App. 1983).

203. *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 382 (Mo. 1986).

204. *Weinstein, Improving Expert Testimony*, 20 U. RICH. L. REV. 473 (1986).

An expert can be found to testify to the truth of almost any factual theory, no matter how frivolous, thus validating the case sufficiently to avoid summary judgment and force the matter to trial. At the trial itself an expert's testimony can be used to obfuscate what would otherwise be a simple case.

Id. at 482.

205. *Cryts v. Ford Motor Co.*, 571 S.W.2d 683, 688 (Mo. Ct. App. 1978); *Higgins v. Paul Hardeman, Inc.*, 457 S.W.2d 943, 948 (Mo. Ct. App. 1970).

206. *Elmore v. Owens-Ill., Inc.*, 673 S.W.2d 434, 438 (Mo. 1984) (en banc) (state of the art

percentages to each.²⁰⁷ The jury is not permitted to assign fault to an entity, no matter how apparently culpable, that is not a party to the litigation.²⁰⁸

To prevail on the punitive damage claim, *A* must convince the jury by a preponderance of the evidence that *C* knew of the danger caused by an alleged defect and showed "complete indifference to or conscious disregard for the safety of others."²⁰⁹ The punitive damages claim is freely permissible.²¹⁰ Further, the engineer's report will be readily discoverable, and *A*'s experts may be expected to use it to seek to show reprehensible conduct by *C*. The jury may thereupon award an amount that it concludes will punish the defendant and deter it and others from like conduct.²¹¹ In practice, the jury's award need not be related to the compensatory damage award. A punitive damage award against an U.S. manufacturer in this case could be in the amount of \$1,000,000 or more.

If *B* is sued, and has ample insurance, *C*'s insurer would want to know its right to seek funds from *B* and his insurer. In theory, *C* has such a right.²¹² In practice, it may not, because if *A* settles with *B*, for any amount, it will have no such right. At the trial, with *C* the lone defendant, the jury would not be permitted to know of the settlement, much less its amount.²¹³ Even if *A* does not settle with *B*, *A* can keep *B* in the case until the close of the trial and then voluntarily dismiss *B*, proceeding to the jury solely against *C* and only on the theory of strict liability. Since there could then be no verdict of actionable negligence against two parties, there could be no right to contribution.²¹⁴

A's compensatory damages award in this case of up to \$1 million would not likely be disturbed by a Missouri appeals court.

In 1987, the Missouri legislature stated that "immediate action is necessary to restore the affordability and availability of liability insur-

evidence has no bearing on the outcome of a strict liability claim); see also *Cryts*, 571 S.W.2d at 689.

207. This is permissible now only by reason of the Tort Reform Act of 1987, H.B. 700, 84th Assembly, 2nd Sess. (1987). If *A* filed a strict liability case against *C* before the Act's effective date, July 1, 1987, *A*'s fault could not be considered by the jury. *Lippard v. Houdaille Indus., Inc.*, 715 S.W.2d 491 (Mo. 1986) (en banc).

208. Tort Reform Act of 1987, H.B. 700, 84th Assembly, 2nd Sess. (1987).

209. *Sparks v. Consolidated Aluminum Co.*, 679 S.W.2d 348, 354 (Mo. Ct. App. 1984) (citing *Racer v. Utterman*, 629 S.W.2d 387, 396-97 (Mo. Ct. App. 1981)).

210. *Rinker v. Ford Motor Co.*, 567 S.W.2d 655, 669 (Mo. Ct. App. 1978).

211. MISSOURI ANNOTATED JURY INSTRUCTIONS § 10.04.

212. *Missouri Pac. R.R. v. Whitehead & Kales Co.*, 566 S.W.2d 466 (Mo. 1978) (en banc).

213. MO. ANN. STAT. § 537.060 (Vernon Supp. 1987).

214. *Sweet v. Herman Bros.*, 688 S.W.2d 31, 32 (Mo. Ct. App. 1985).

ance," whereupon it passed an "emergency act"²¹⁵ and sent it to the Governor, who signed this Tort Reform Act into law.²¹⁶ However, nothing in the Act significantly alters the risks in the hypothetical case, from the viewpoint of an insurer.

The practical effect of the Act coerces the insurer to settle: if *A*'s attorney demands that an insurer settle a case for a sum certain and it refuses to do so, even if its grounds are wholly reasonable, and if the matter then goes to trial and the jury awards *A* even a penny more than the earlier demand, the insurer will pay prejudgment interest on the entire verdict. The same rule applies to any settlement offer it may make.²¹⁷

Under the Reform Act, evidence that a private insurer like *D* has paid some or all of *A*'s medical expenses is made admissible.²¹⁸ However, this evidence is admissible only if *C* agrees to pay all of *A*'s special damages before trial begins. The jury may not know that it was *D* who actually paid the medical expenses, and if *C* elects to have the jury told that someone did pay them, it may have no credit in the amount of that payment if the plaintiff then receives a verdict from the jury.²¹⁹

As for punitive damages, the Reform Act requires a bifurcated trial,²²⁰ and the likely effect of that rule is ameliorative. A few other changes were made, but none that would significantly affect *C*'s insurer's financial risk.

As to the questions of incidental interest, *B* will not be presumed to have been intoxicated under Missouri law, for driving with a 0.08% blood alcohol level is permissible and not an offense under Missouri's criminal laws.²²¹

Missouri has a seat belt law,²²² but its provisions are mild when compared with belt usage laws in most of the eight nations whose laws were reviewed. In Missouri, the failure of *A* and *B* to wear available safety belts may "not be considered evidence of comparative neg-

215. Act effective July 1, 1987, 1987 Mo. Legis. Serv. 1 (Vernon) (codified at MO. ANN. STAT. § 374.170 (Vernon Supp. 1988)).

216. *Id.*

217. MO. ANN. STAT. § 408.040 (Vernon Supp. 1988).

218. Reform Act, MO. ANN. STAT. § 38 (Vernon Supp. 1988).

219. *Id.*

220. *Id.* § 39.

221. MO. ANN. STAT. § 577.012 (Vernon Supp. 1987). In Missouri, the legal blood alcohol limit is 0.10%. *Id.*

222. MO. ANN. STAT. § 307.178 (Vernon Supp. 1987).

ligence"²²³ should either *A* or *B* sue *C*, even if the sole allegation by *A* is that some defect in the design of the car's interior design enhanced his injuries.²²⁴ The law provides only for secondary enforcement,²²⁵ and the maximum fine permitted is \$10.²²⁶

This is not to say that *C* is foreclosed from seeking relief. If *A* was not wearing his safety belt, in violation of the law, then after the jury has made its comparative fault determinations (of course, it will have ignored *A*'s failure to wear the belt), *C* may "introduce expert evidence proving that a failure to wear a safety belt contributed to [*A*'s] injuries [whereupon the jury] may reduce the amount of [*A*'s] recovery."²²⁷ However, the jury's reduction, regardless of the evidence, may not "exceed one percent of the damages awarded."²²⁸

If the hypothetical accident were to occur across the state boundary line, and thus in Kansas, there would be a difference in the estimated risk of several hundred thousand U.S. dollars, as we shall see—a difference that is itself in excess of the adverse exposure for the accident, as a practical matter, in all of the nations whose laws we have reviewed.

B. Kansas

A can sue *C* company, though he must do so within two years after his accident.²²⁹ His case may be based upon negligence, strict liability, implied warranty, or all three.

A may make multiple unrelated defect claims²³⁰ and probably may invoke the "enhanced injury" doctrine.²³¹ *A* need not allege a specific defect in his pleadings, but even if he does, he may allege a new, unrelated defect at trial.²³² *A* may claim various unrelated defects in design, manufacture or assembly and various failures to warn.

223. *Id.* § 307.178(3).

224. *See supra* note 195. Since safety belts are part of a vehicle's interior design, *A*'s deliberate failure to utilize this design feature would seem factually relevant to the jury's overall determination of fault.

225. MO. ANN. STAT. § 307.178(2) (Vernon Supp. 1987). "No person shall be stopped, inspected or detained solely to determine compliance with this subsection." *Id.*

226. MO. ANN. STAT. § 307.178(4) (Vernon Supp. 1987).

227. *Id.* § 307.178(3).

228. *Id.*

229. KAN. STAT. ANN. § 60-513(c)(2) (1983).

230. *Id.* § 60-208(e)(2).

231. There is no reported Kansas case expressly permitting an enhanced injury claim. However, Kansas trial courts routinely permit such claims.

232. KAN. STAT. ANN. § 60-215(b) (1982); *see also* *Thurman v. Cundiff*, 2 Kan. App. 2d 406, 580 P.2d 893 (1978).

He may sue *B*, and his spouse may sue for the loss of *A*'s services. Further, punitive damage claims will be freely allowed.

Kansas does not have the joint and several liability rule.²³³ Therefore, the jury will be asked to determine the fault of all entities, *whether or not all are or could be parties to the litigation.*²³⁴ This means in this case that if *B* is determined to have been at fault by some amount, whether or not anyone successfully sues *B*, that percentage will be subtracted from *A*'s recovery. *A*'s fault will be considered as well. Indeed, if *A* is found to have been fifty percent or more at fault, he can recover nothing.²³⁵

The "state of the art" defense is permissible in a Kansas defective design case.²³⁶ Thus, there is a substantial likelihood of a verdict for *C* if its engineers find and can demonstrate that the plaintiff's product allegation is incorrect.

A punitive damage award easily could amount to \$1 million. A Kansas jury's compensatory award in this case is likely to vary from \$100,000 to \$600,000.

As to the questions of incidental interest, *B* will not be presumed to have been intoxicated under Kansas law, for driving with a 0.08% blood alcohol level is permissible and no offense under Kansas criminal law.²³⁷

Kansas does have a seat belt usage law²³⁸ but, as in Missouri, its provisions are tentative in comparison with those in the first eight nations. The failure of *A* and *B* to wear available seat belts "shall not be admissible in any action for the purpose of determining any aspect of comparative negligence [nor, unlike Missouri, in] . . . mitigation of damages."²³⁹ The law provides for secondary enforcement only,²⁴⁰ and the maximum fine is \$10.²⁴¹

233. KAN. STAT. ANN. § 60-258(a) (1983).

234. *Id.*; see *Brown v. Keill*, 224 Kan. 195, 580 P.2d 867 (1978).

235. KAN. STAT. ANN. § 60-258(a) (1983).

236. KAN. STAT. ANN. § 60-3307 (Supp. 1987).

237. KAN. STAT. ANN. § 8-1005 (Supp. 1986). The legal blood alcohol limit in Kansas is 0.10%.

238. KAN. STAT. ANN. § 8-2504 (1986).

239. *Id.* § 8-2504(c).

240. *Id.* § 8-2503(e). "Law enforcement officers shall not stop drivers for violations of this act in the absence of another violation of law." *Id.*

241. "[Violators] shall be fined not more than \$10 including court costs." *Id.* § 8-2504(a)(2).

V. DISCUSSION

Doubtless the law in Missouri and Kansas is the result of the collective judgments of the bench, bar and legislature in each state; however, the two resulting systems are markedly inconsistent. In fact, no two of the fifty U.S. states have the same product liability laws, so one could thus proceed to examine differing sets of rules in the forty-eight remaining U.S. jurisdictions. It is both the international liberality and the individuality of the fifty U.S. product liability law systems, however well-intentioned, that create insurance rate-making chaos. One may assume that the bench, bar and legislatures in each of the eight nations studied also continually seek to enhance the welfare of their citizens, but the legal system in each nation is far more likely to permit intelligent insurance rate-making. That is the case both now and as the law in some of them will be after implementation of the EEC Directive. In all of the U.S. jurisdictions, juries hear technical evidence, decide disputed engineering questions and award damages. The contingent fee system is alive and well, and no losing plaintiff must reimburse the defendant for all or much of its litigation expenses.

The late twentieth century is a time of instant global communication and complex international trade, where world financial markets frequently fluctuate together and product designs vary little. The U.S. liability system stands in bold relief, clearly in contrast to all others. Such a system simply is nonexistent anywhere else in the world. The word "radical" means a "considerable departure from the usual or traditional."²⁴² This experimental, historically-new U.S. system, still after nearly a full generation unimitated by any other nation, is radical from a world perspective. And what of the generally-accepted U.S. product liability reform agenda? Is it radical? Let us resort to a standard dictionary definition once again: a reform agenda would be "radical" if it would make "extreme changes in" the existing system.²⁴³

What changes in the U.S. system would be "extreme"? Extreme changes would be those that would summarily bring the U.S. system into harmony with those of nations with whose economies the U.S. must compete on a daily basis. Extreme changes might be:

242. Definition of "radical" from WEBSTER'S THIRD NEW INT'L DICTIONARY 1872 (1961).

243. *Id.*

1. The total elimination of personal injury litigation, as in New Zealand and Sweden.
2. The continued viability of personal injury litigation but with these changes:
 - (a) Total elimination of the contingent fee system.
 - (b) Total elimination of the jury system.
 - (c) Damage awards by judges that would be appreciably far lower and easier to predict in advance by rate-making insurers than those seen in the U.S. today.
 - (d) Total elimination of punitive damages.
 - (e) Requiring losing litigants to pay most or all of the prevailing litigants' costs.
3. No substantive changes whatsoever except substantial and unyielding limitations on damage awards. (This could be of some assistance in insurance rate-making. Obviously, it would affect only the amount of an award and not the likelihood of one.)

It is beyond cavil that any one of these reform programs would be extreme and would seem radical to virtually all U.S. observers. Doubtless, each would raise significant constitutional questions. Further, even though businesses seem increasingly to rail at the bar,²⁴⁴ no U.S. business group has seriously advocated any one of these extreme reform programs, nor is any one of them advocated here. Yet the facts compel one to admit that to describe the domestic legal system in this way would not be thought "radical," as to the first numbered reform, in New Zealand or Sweden, or, as to the second, in *any* of the other nations whose systems we have studied.

The United States' strict liability system is radical,²⁴⁵ and it is unique in the world. It has not developed over centuries.²⁴⁶ It is a uniquely U.S. experiment launched in the mid-1960's, and one can see how it came to be.²⁴⁷ It cannot claim a rich common law heritage,²⁴⁸

244. Consider, for example, this recent observation by a United States business executive, speaking of Japan: "They've got about as many lawyers as we've got sumo wrestlers." L. Iacocca, *quoted in* Wall St. J., Oct. 27, 1987, at 1, col. 5; *see Wheel of Fortune*, Wall St. J., Nov. 16, 1987, at 26, col. 1; *see also Legal Smoke*, Wall St. J., Feb. 22, 1988, at 22, col. 1.

245. *See supra* note 242 and accompanying text.

246. "We are appalled, too, at the proponents' studied indifference to the cherished history and development of the common law of product liability, a body of law which has developed over centuries." *See Hearings on S. 44, supra* note 5, at 179.

247. *Id.*

248. "The proponents [of product liability reform] would stamp out the vitality of common law, choke off its health and its capacity to grow and be nurtured . . ." *See Hearings on S. 2631, supra* note 15, at 199.

unlike many principles of tort law, because no common law nation in the world has ever had it, including England, the mother country. Every nation in the world—common law, civil law, “East European code country,”²⁴⁹ or however else one might characterize the world’s legal systems—has had more than twenty years to observe and then adopt the unique U.S. system, but not a single nation has done so.

What then is the justification for the unbridled continuation of this system? Various reasons are advanced for the U.S. to remain *in statu quo* and thus reject all product liability reforms. For example, it is suggested that the U.S. system provides compensation to injured persons.²⁵⁰ However, the systems in effect in New Zealand and Sweden accomplish that end. They do it for all victims, rather than a few, and with minimal transactional cost.²⁵¹

It has been suggested that U.S. products litigation increases product safety.²⁵² In the summer of 1944,²⁵³ when the attention of the nation was focused on a world war in Europe and in the Pacific, that was a theory. It is no theory today. The United States has served as a societal proving ground for this system for more than 20 years. Today one can test the 1944 theory.

Let us again use the automobile as the product example, although obviously one could use other product examples. The United States has utilized a strict liability system for more than twenty years, while the Federal Republic of Germany has not had it for a single day. If the theory that the U.S. product liability system increases U.S. product safety was valid, then after twenty years one should be able to see unmistakable results. If the claim was valid, it would be clear by now, after nearly a generation of U.S. litigation, that U.S. automobiles are far safer than those made in West Germany today for its domestic market.

249. “We should for [product liability reformers’] sake deteriorate to the level of an east European code country.” See *Hearings on S. 44*, *supra* note 5, at 179.

250. *Id.*; *Hearings on S. 2631*, *supra* note 15, at 87.

251. The U.S. systems generally compensate few victims and have transactional costs so significant that payments to counsel may exceed or at least approach payments to victims. See, e.g., S. REP. No. 422, 99th Cong., 2d Sess. 1 (1986).

252. “Litigation, and the fear of litigation, has proven to be an effective method of improving products . . . and above all else improving safety.” See, e.g., *Hearings on S. 44*, *supra* note 5, at 193 (response to written questions from Senator Kasten); see also *Hearings on S. 2760*, *supra* note 15, at 302-03; “The product liability system is responsible for improving the safety of product.” *Hearings on H. 1115*, *supra* note 15, at 90.

253. See *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436. The court’s opinion, and thus the concurrence of Justice Traynor, is dated July 4, 1944. *Id.*

Today a visitor to a major international automotive display, such as the Frankfurt Auto Show, should be able to conclude by viewing its North American auto exhibit that U.S.-market cars are far safer than those on display anywhere else in the exhibition hall. It should also be readily apparent that the U.S. cars are significantly better made, with designs that clearly offer increased occupant protection, when compared with, say, BMW, Porsche or Mercedes-Benz vehicles. Further, it should be clear that this profound difference is the sole result of U.S. jury decisions that have successfully communicated to manufacturers just how to build the much safer cars that the auto shows exhibit. It would not prove the case for strict liability, for example, to show any beneficial result in design caused by those complex collections of written regulations written by scientists for scientists, such as, for the most part, the U.S. Federal Motor Vehicle Safety Standards.

Japan, too, has never implemented the U.S. system of strict liability. Japanese automotive engineers should by now, after more than twenty years of U.S. strict liability awards, be heard to proclaim that Japanese cars exported to the U.S. must be made dramatically and significantly safer than their Japanese-market counterparts.

Swedish automotive engineers, who live and work in the nation with the least product liability litigation risk here studied, should be observed to hold the same views about U.S.-market cars. Safety-conscious consumers the world over should by now be clamoring for the significantly safer litigation-driven U.S. designs. But none of these effects seem to be occurring after a full generation of this unique U.S. legal experiment.

One must pause here to observe that United States product liability litigation has contributed to or caused the elimination of particular product designs from the marketplace. Doubtless, at least in some of the more extreme cases, many U.S. citizens would agree with the propriety of those disappearances. However, because litigation has caused isolated product designs to disappear, even if the disappearance was wholly deserved, does not demonstrate the overall historical efficacy of the unique U.S. system. The fundamental question is whether, after twenty-five years, U.S. products as a whole are dramatically safer than similar products in other advanced nations, as dramatically safer as the enormous cost of U.S. product liability litigation would suggest they should be.

It is far too late in the day to advance the proposition that U.S.

product liability verdicts have made all or even most U.S. products safer. In the case of the automobile, for example, genuine automotive safety progress has been relatively uniform on a worldwide basis. It has been the result of hard work by scientists and engineers, both in the U.S. and elsewhere in the world. Scientific advances have been made, to be sure, but they have not been limited to the United States. And, as always throughout history, scientific discoveries have not occurred upon the mere imprecations of kings, or corporate critics, or lawyers, or even of a jury sitting in an U.S. courtroom.

The time for at least modest reform is now. The United States product liability system has been permitted to go much too far. It is new historically, and obviously experimental, because it has no jurisprudential antecedent in the common law or elsewhere. At least some modest corrections—but certainly not radical or extreme ones²⁵⁴—are appropriate, must be made, and indeed have been made in a number of U.S. states.

VI. TWO PARTICULAR REFORMS

The modest reforms presently urged for the U.S.²⁵⁵ would not render the international insurance rate-maker's task simple, but they would serve to decrease the extent of the current chaotic situation that makes the task essentially impossible. While reform could occur at the federal level, *seriatim* in fifty states, or both, the former is obviously the less complex course. The modest ameliorative reforms urged often include the two particular ones discussed below.

A. *Joint and Several Liability*

This old English common-law doctrine is not unknown today in other nations. In U.S. practice, however, it creates profound unfairness and contributes to the insurance rate-making chaos when it is permitted to coexist not only along with large damage awards but with another tort doctrine, pure comparative fault. This is the case today in a number of U.S. jurisdictions.²⁵⁶

254. See *supra* note 242 and accompanying text for reforms that *would* be radical, but only from the post-1965 U.S. perspective.

255. See *supra* note 8.

256. *E.g.*, ARK. STAT. ANN. §§ 34-1002, 1003 (1962); MICH. COMP. LAWS ANN. § 600.2949 (West 1986); MINN. STAT. § 604.01 (Supp. 1988); MISS. CODE ANN. §§ 11-7-15, 85-5-5 (1973); PA. STAT. ANN. tit. 17, §§ 2101, 2102 (Purdon 1967); R.I. GEN. LAWS § 9-20-4 (1985); *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854 (W.Va. 1982); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W.Va. 1979).

The combined doctrines operate so that a solvent manufacturer found minimally at fault—say five percent—may nevertheless be compelled to pay one hundred percent of a jury's damage award, no matter how large the award. To demonstrate, let us assume that a tire manufacturer—say Firestone—is found five percent at fault in a product liability case. One must necessarily conclude that Firestone has been found free from ninety-five percent of the fault and for that ninety-five percent, Firestone is not a tortfeasor. Should courts require, for example, Goodyear or Uniroyal or Citibank to pay that ninety-five percent? If not, why not? The first two companies also make and sell tires, and all three have assets. They would be no more or less at fault for the ninety-five percent of the damage than Firestone. The fact is that not one of the four entities is at fault for the ninety-five percent. Goodyear, Uniroyal and Citibank are not at fault because they were not and could not have been made parties to the litigation. Firestone is not at fault because a court having jurisdiction over it has so determined. If Firestone (or, for that matter, one of the other entities) is ordered to pay the ninety-five percent, it will do so, by definition, as a faultless party.

There is a way to correct this obvious unfairness and simultaneously free the prudent international insurer from attempting to calculate rates for a jurisdiction in which a scintilla of fault—one percent—means the insured may be liable for an entire multi-million dollar verdict. A number of United States jurisdictions already, either in court decisions²⁵⁷ or by statute,²⁵⁸ have eliminated the archaic and unfair joint and several liability doctrine. Each defendant is responsible for its own fault. Those who would preserve the system in the interest of compensating a few citizens must explain why they would rather not urge adoption of the New Zealand or Swedish system and compensate them all.

B. Punitive Damages

In many U.S. jurisdictions, a jury of six or more citizens may determine, by a preponderance of the evidence, that a product defendant has acted "with malice"—by court decision²⁵⁹ or statute²⁶⁰—or

257. *E.g.*, *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (1982); *Marchese v. Warner Communications, Inc.*, 100 N.M. 313, 670 P.2d 113 (1983).

258. *E.g.*, ARIZ. REV. STAT. ANN. § 12-2506 (1987); COLO. REV. STAT. § 13-21-111.5 (1986); KAN. STAT. ANN. § 60-258(a) (1983); UTAH CODE ANN. § 78-27-40 (1986); WYO. STAT. ANN. § 1-1-109(d) (1986).

259. *E.g.*, *Jolley v. Puregro*, 94 Idaho 702, 496 P.2d 939 (1972); *Ruiz v. Southern Pacific*

“recklessly,”²⁶¹ whereupon they may award vast amounts, as they decide, far in excess of any reasonably predictable compensatory award.

These huge awards, sometimes fired off even in nine-figure salvos,²⁶² are usually to be divided between the successful lawyer and his client on about a forty-sixty basis. The damages are not intended for the plaintiff's medical care, of course, for that will have been the purpose of the jury's compensatory award. For the international insurance rate-maker, the proposition that a given U.S. jury award may present an adverse financial risk varying from substantial and unrecoverable defense attorney fees and other costs upon victory for the insured, to up to \$100 million in compensatory and punitive damages upon victory for the plaintiff, presents no little disharmony to the traditional rate-making enterprise.

In some jurisdictions, for the jury to award punitive damages it must find the defendant's conduct to have been “outrageous.”²⁶³ However, if the jury acted out of “passion” the appeals court will overturn the award.²⁶⁴ Apparently, a jury capable of dispassionate

Trans. Co., 94 N.M. 194, 638 P.2d 406 (1981); *Berberian v. New England Tel. & Tel. Co.*, 117 R.I. 629, 369 A.2d 1109 (1977); *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 297 S.E.2d 675 (1982); *Wells v. Smith*, 297 S.E.2d 872 (W.Va. 1982); *Wilson v. Hall*, 34 Wyo. 465, 244 P. 1002 (1926).

260. *E.g.*, MONT. CODE ANN. § 27-1-221 (1983); NEV. REV. STAT. § 42.010 (1980); N.D. CENT. CODE § 32-03-07 (1983).

261. *E.g.*, *Johnson v. Huskie Indus.*, 536 F.2d 645 (6th Cir. 1976); *Johnson v. Colt Indus. Operating Group*, 609 F. Supp. 776 (D. Kan. 1985) *aff'd.*, 797 F.2d 1530 (10th Cir. 1986); *Phillips v. Aetna Life Ins. Co.*, 473 F. Supp. 984 (D. Vt. 1979); *Sioux City Community School Dist. v. Int'l Tel. & Tel. Corp.*, 461 F. Supp. 662 (N.D. Iowa 1978); *Forrest City Mach. Works, Inc. v. Aderhold*, 273 Ark. 33, 616 S.W.2d 720 (1981); *Cantrell v. Amarillo Hardware Co.*, 226 Kan. 681, 602 P.2d 1326 (1979); *Ruiz*, 94 N.M. 194, 638 P.2d 406.

262. For example, the jury's award in *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981), included a punitive damages award of \$125,000,000 and the jury in *Durrill v. Ford Motor Co.*, 714 S.W.2d 329 (Tex. Ct. App. 1986), handed down a punitive damages award of \$100,000,000. Both awards were reduced substantially. The trial court in *Grimshaw* reduced the punitive damages award to \$3,500,000 as a condition of its award of a new trial, and the reduction was upheld on appeal. The trial court in *Durrill* ordered plaintiffs to file a remittitur of \$80,000,000 of the punitive damages award as a condition precedent to its denial of defendant's motion for a new trial, and on appeal, there was a further reduction of \$10,000,000. No prudent international insurance rate-maker, however, can wholly ignore the reality that in U.S. jurisprudence such jury awards have occurred.

263. *E.g.*, *Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132 (3d Cir. 1973); *Olsen v. United States*, 521 F. Supp. 59 (E.D. Pa. 1981) *aff'd without op.*, 688 F.2d 823 (3d Cir. 1982), *cert. denied*, 459 U.S. 1107 (1983); *Jolley*, 94 Idaho 702, 496 P.2d 939; *Oakview New Lenox School Dist. v. Ford Motor Co.*, 61 Ill. App. 3d 194, 378 N.E.2d 544 (1978).

264. *See, e.g.*, *Mendenall v. MacGregor Triangle Co.*, 83 Idaho 145, 358 P.2d 860 (1961); *Nat'l Bank of Monticello v. Doss*, 141 Ill. App. 3d 1065, 491 N.E.2d 106 (1986); *Kirkbride v. Lisbon Contractors, Inc.*, 357 Pa. Super. 322, 516 A.2d 1 (1986).

outrage is the one that these strict liability systems would have make such decisions, and the insurance rate-makers must add this into their rate-making calculations as well.

At the very least, if this punitive damage system—which acts as a quasi-criminal tribunal, without criminal law protections for the defendant, and creates a lottery-like tribunal for the plaintiff—is to be preserved as a kind of authentic Americana (for it is clearly unique among all world legal systems), then in minimal fairness the court should instruct the jury not to return such a verdict unless it finds clear and convincing evidence of the requisite conduct by the defendant. The leading legal scholar in the field recently expressed his agreement with this proposition.²⁶⁵ Some jurisdictions have already adopted the clear and convincing standard, either by court decision²⁶⁶ or statute.²⁶⁷ Further, the American Bar Association endorses it,²⁶⁸ and this reform, at the very least, seems necessary.

Another suggested legal reform requires that conduct found punitive must have been an extreme departure from accepted standards of conduct. Recently, one leading jurisdiction amended its punitive standard to include the word “despicable.”²⁶⁹ In addition, recently enacted statutes in several jurisdictions provide that the jury may not hear punitive damages evidence until after trial on the compensatory damages claim.²⁷⁰ All these concepts could introduce amelioration into this unique body of law.

265. “The “clear and convincing evidence” standard of proof . . . is the only proper standard . . . [which is] demonstrated by a newly emerging trend in both case law and legislation.” See *Hearings on H.R. 1115*, *supra* note 15, at 2 (statement of Professor David G. Owen).

266. *E.g.*, *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985); *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 194 N.W.2d 437 (1980).

267. *E.g.*, ALASKA STAT. § 09.17.020 (Supp. 1987); Act of Sept. 30, 1987, ch. 1498, § 3294, 1987 Cal. Legis. Serv. 846, 850-51 (West); IND. CODE ANN. § 34-4-34-2 (West Supp. 1987); Act effective Jan. 1, 1988, § 2315.21, 1987 Ohio Legis. Bull. 511, 518-19 (Anderson); OR. REV. STAT. § 30.925 (1987).

268. At the 1987 midyear meeting in New Orleans, the American Bar Association House of Delegates adopted the recommendation of the ABA Action Commission to Improve the Tort Liability System that the Association should endorse the clear and convincing standard, for punitive damage claims. Geller & Levy, *The Constitutionality of Punitive Damages*, 73 A.B.A. J. 88, 91 (1987).

269. Act of Sept. 30, 1987, ch. 1498, 1987 Cal. Legis. Serv. 846 (West). Malice and oppression are defined as “despicable conduct.” *Id.* § 3294(c).

270. *E.g.*, ALASKA STAT. § 09.17.020 (Supp. 1987); Act of Sept. 30, 1987, ch. 1498, 1987 Cal. Legis. Serv. 846 (West); Act effective July 1, 1987, 1987 Mo. Legis. Serv. 1 (Vernon); Act of July 22, 1987, ch. 197, 1987 N.J. Sess. Law Serv. 188 (West); Act effective Jan. 1, 1988, 1987 Ohio Legis. Bull. 511 (Anderson).

VII. CONCLUSION

The argument for U.S. product liability law reform is strong, and it is now based upon experience. Ours is simply another one of those times and places in the long history of the common law in which, to paraphrase Sir Thomas Browne, demonstrated infirmities require correction.²⁷¹

271. T. BROWNE, *RELIGIO MEDICI* 89 (G. Keynes ed. 1928).

[T]hose three Noble Professions which all civil Commonwealths doe honour, are raised upon the fall of Adam, and are not any way exempt from their infirmities; there are not onely diseases incurable in Physicke, but cases indissoluble in Lawes, Vices incorrigible in Divinity: if general councells may erre, I doe not see why particular Courts should be infallible; their perfectest rules are raised upon the erroneous reason of Man, and the Lawes of one doe but condemn the rules of another

